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COMMITTEES:
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LEGISLATIVE COUNCIL

DISTRICT 8

Arizona House of Representatives
Phoenix, Arizona 85007

May 1, 2019

Representative John Allen
Representative Kirsten Engel
Representative Gail Griffin
Representative Diego Rodriguez
Members of the Ethics Committee
Arizona House of Representatives
1700 W. Washington Street
Phoenix, AZ 85007

Re: Ethics Complaint; Representative Anthony Kern; R. McHood 4-10-2019

Dear Members of the Committee:

Following my letter to committee members dated April 15, 2019, I requested legal research from the non-partisan attorneys at the Arizona Legislative Council regarding the provisions of Article 4, Part 2, Sections 4 and 5 of the Arizona Constitution raised in Ms. McHood's complaint against Representative Anthony Kern. A copy of my letter dated April 22, 2019 to Executive Director Michael Braun is attached for reference. The legal research and conclusions of Legislative Council attorneys are contained in their memo dated April 30, 2019, also attached for reference.

The McHood complaint alleges Representative Kern is disqualified from holding legislative office by virtue of his association with the City of Tombstone and that his expulsion be recommended pursuant to the Arizona Constitution. By making preliminary inquiry to the City of Tombstone, I am informed that between February 2017 and March 2019 Representative Kern served as a reserve deputy marshal for the city in a volunteer capacity. He was not paid a salary or wages for his services.

House Rule 1 provides: "The House may punish its members for disorderly behavior and may, with the concurrence of two-thirds of the members elected to the House, expel any member (Arizona Constitution, Article 4, Part 2, Section 11). A violation of any of the House Rules shall be deemed disorderly behavior." A.R.S. § 38-519(E) in part states that "[a] member is subject to punishment or expulsion . . . for any violation of the code of ethics, conflict of interest or financial disclosure requirements." These are found in House Rules 33 and 34 respectively. There are no allegations in the McHood complaint that could adequately support a claim of a violation of House Rule 33 or 34.

The Arizona Constitution does not specify the types of conduct that amount to "disorderly behavior" within the meaning of Article 4, Part 2, Section 11. Instead, the Constitution commends the application of that standard to the discretion of each chamber. To that end, the investigation of complaints against members is primarily the purview of the Ethics Committee in each chamber. A.R.S. § 38-519(D). Each Ethics Committee, in turn, promulgates its own rules governing the complaint process. *See generally*, Rules of Procedure for the House Ethics Committee. Under A.R.S. § 38-519 and our rules, not every complaint requires a hearing or formal recommendation to the whole House. Instead, the investigation process is left to the discretion of the Ethics Committee Chairman.

In light of the April 30, 2019 opinion from Legislative Council, it is clear to me that Representative Kern was not in violation of the relevant Arizona constitutional provisions by serving as a volunteer reserve deputy marshal for the City of Tombstone. Representative Kern, although not required to, resigned his volunteer position with the City of Tombstone in March 2019. Therefore, the inferences drawn and conclusions made in the McHood complaint are not sufficient to invoke further action by the Committee. This matter before the Ethics Committee is closed.

Sincerely,

A handwritten signature in black ink, appearing to read "T. R. Shope, Jr.", with a stylized flourish at the end.

Thomas R. Shope, Jr.

Chairman

House Ethics Committee

Enclosures:

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DISTRICT 8

Arizona House of Representatives
Phoenix, Arizona 85007

April 22, 2019

Michael Braun
Arizona Legislative Council
1700 W. Washington Street
Phoenix, AZ 85007

Re: Ethics Complaint; Representative Anthony Kern; R. McHood 4-10-2019

Dear Mr. Braun:

I am writing to request an opinion on a matter that has been filed with the House Ethics Committee regarding Representative Anthony Kern. A copy of the complaint is enclosed for reference. As you know from our recent discussion, I am seeking guidance on Arizona Constitutional provisions regarding dual office holding, Article 4, Part 2, Sections 4 and 5. Representative Kern has served in the Arizona House of Representatives during the 52nd, 53rd and 54th Legislatures.

Since our discussion, the following information has been gathered:

- Mr. Kern served as a reserve deputy marshal for the City of Tombstone in a volunteer capacity.
- Mr. Kern was not paid a salary or wages for his services.
- Mr. Kern served the City of Tombstone from February 2017 to March 2019 when he ended his volunteer relationship with the city.

Based on this information, I am seeking an opinion on the following questions:

1. Did Mr. Kern violate Article 4, Part 2, Section 4 of the Arizona Constitution by serving the City of Tombstone as a volunteer reserve deputy marshal?
2. Did Mr. Kern violate Article 4, Part 2, Section 5 of the Arizona Constitution by serving the City of Tombstone as a volunteer reserve deputy marshal?
3. If Mr. Kern violated either Article 4, Part 2, Section 4 or 5 of the Arizona Constitution, what would be the remedy required?

Sincerely,

A handwritten signature in black ink, appearing to read "T.R. Shope, Jr.".

Thomas R. Shope, Jr.
Chairman, House Ethics Committee

ARIZONA LEGISLATIVE COUNCIL

MEMO

April 30, 2019

TO: Representative T.J. Shope, Chairman, House Ethics Committee

FROM: Anthony Tsontakis, Council Attorney
Kenneth C. Behringer, General Counsel
Michael E. Braun, Executive Director

RE: Ethics Complaint; Representative Anthony Kern; R. McHood 4-10-2019
(R-54-36)

BACKGROUND

Article IV, part 2, sections 4 and 5 of the Constitution of Arizona relate to what is colloquially known as "dual office holding" – generally speaking, a situation where a member of the legislature simultaneously holds a government office or is simultaneously employed by a government body in addition to his or her legislative office. In response to an ethics complaint filed with the House Ethics Committee against Representative Anthony Kern that apparently implicates the two constitutional sections, you have asked us to answer several questions that you have transmitted to our office in light of the following facts¹ gathered by the House Ethics Committee:

- Representative Kern served as a reserve deputy marshal for the City of Tombstone in a volunteer capacity from February 2017 to March 2019, when he ended his volunteer relationship with the city.
- Representative Kern was not paid a salary or wages for his services.

QUESTIONS

1. Did Representative Kern violate article IV, part 2, section 4 (Section 4) of the Arizona Constitution by serving the City of Tombstone as a volunteer reserve deputy marshal?

¹ The analysis contained in this memorandum is based on these facts, which have not been independently verified by Legislative Council.

2. Did Representative Kern violate article IV, part 2, section 5 (Section 5) of the Arizona Constitution by serving the City of Tombstone as a volunteer reserve deputy marshal?

3. If Representative Kern violated either article IV, part 2, section 4 or 5 of the Arizona Constitution, what would be the remedy required?

ANSWERS

1. We do not believe Representative Kern violated Section 4. Section 4 applies to people who hold certain public offices of profit or trust who become members of the legislature. Section 4 is inapplicable here because a volunteer reserve deputy marshal is not a public office of profit or trust under Section 4. *See DISCUSSION.*

2. We do not believe Representative Kern violated Section 5. Section 5 applies to members of the legislature who assume any other office or are otherwise employed by certain government bodies (with exceptions). "Office" and "employment" have different meanings under Section 5. A volunteer reserve deputy marshal is not an office for the purposes of Section 5. A volunteer position that is not an office does not fall within the scope of the "otherwise employed" language in Section 5 because the meaning of "otherwise employed" includes the payment of wages or a salary. Section 5 is inapplicable here because a volunteer reserve deputy marshal is not an office or employment under Section 5. *See DISCUSSION.*

3. Under the law, a violation of either Section 4 or Section 5 does not implicate the legal status of a person's membership in the legislature. Rather, a violation of either Section 4 or Section 5 implicates the legal status of the non-legislative office or employment in question. *See DISCUSSION.*

DISCUSSION

Section 4 reads as follows:

No person holding any public office of profit or trust under the authority of the United States, or of this state, shall be a member of the legislature; Provided, that appointments in the State militia and the offices of notary public, justice of the peace, United States commissioner, and postmaster of the fourth class, shall not work disqualification for membership within the meaning of this section.

Section 5 reads as follows:

No member of the legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the state of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of

school trustee, nor to employment as a teacher or instructor in the public school system.

Section 4 and Section 5 have distinct spheres of applicability. Section 4 by its terms prohibits a person who holds a public office of profit or trust in either the United States or Arizona government from also being a member of the legislature (with exceptions), while Section 5 by its terms applies to the eligibility of a member of the legislature to hold any other office or be otherwise employed by a government body within Arizona during the term for which the member was elected or appointed (with exceptions).

The definitive case is *McCluskey v. Hunter*, 33 Ariz. 513 (1928). In *McCluskey*, the court explored the reason why it was constitutional for the legislature to create offices on the Colorado River Commission and appoint sitting members of the legislature to several of those offices. 33 Ariz. at 532-33. At the time *McCluskey* was decided, Section 5 existed in a different form and provided as follows:

No member of the Legislature, during the term for which he shall have been elected, shall be appointed or elected to any civil office *of profit* under this State, which shall have been created, or the emoluments of which shall have been increased, during said term. (Emphasis added).

Most significant for the purposes of this memorandum, Section 4 was in full effect at the time *McCluskey* was decided, in the same form it exists today. This is important because Section 4 made (and still makes, because it has never been amended) reference to "any public office of profit *or trust*" while Section 5 at the time made reference to "any civil office *of profit*" only, and not to any office of trust. Section 4 was a non-factor in the court's reasoning and the court said that while the constitution prohibited a member of the legislature from being appointed during his term to "an office of profit," which is an office that compensates its holder, "in no way [did] it [Section 5] interfere with a legislator's right to hold an office of trust" during his term, meaning an office that does not pay its holder. *Id.* at 532. The court elaborated:

Doubtless it was the fact that members of the Legislature would have been ineligible [to serve] as commissioners [of the Colorado River Commission] had the act [that created the Colorado River Commission] provided that they should be remunerated for their services that led to the insertion of the provision requiring them to serve without pay, but this requirement along with the one denominating the commissionerships as offices indicates that it was the Legislature's intention to create an office (of trust) [sic] to which all of its members would be eligible.

Id. Section 4 therefore applies to people who are officeholders prior to their becoming members of the legislature only; for its part, Section 5 does not become operative unless and until membership in the legislature is established as a matter of law. See *State ex rel. Pickrell v. Myers*, 89 Ariz. 167 (1961) (Section 5 can be implicated if

and only if the person as a matter of law assumed the status of member of the legislature in the first place). Section 4 and Section 5 have distinct spheres of applicability.

Section 4 and Section 5 both operate to protect the legal status of a person's membership in the legislature to the exclusion of any non-legislative office or employment. Under Section 4, if an officeholder not subject to an exception becomes a member of the legislature, the person remains a member of the legislature but is prohibited from serving in "that capacity [i.e., the non-legislative capacity] while serving in the legislature." Ariz. Op. Atty. Gen. No. I84-065, 1984 WL 61277 (May 4, 1984) ("Section 4 does not actually prohibit a public officer from becoming a legislator; Section 4 merely prohibits a public officer from simultaneously serving in the legislature."). Section 5 in slight contrast restricts a person who, as a matter of law, assumed the status of member of the legislature from holding any other office or employment during the relevant term (with exceptions). The member is constitutionally ineligible for those positions, even if he or she first resigns from the legislature or otherwise ceases to be a member of the legislature after legally becoming a member but prior to assuming the prohibited position. See *Myers*, 89 Ariz. at 170-71; see also Ariz. Op. Atty. Gen. No. I77-216, 1977 WL 22141 (Nov. 15, 1977) ("This office has consistently opined that the foregoing constitutional provision [Section 5], on its face, clearly prohibits the taking of any other office or employment during the elective term, whether or not the legislator resigns."). Accordingly, any person who violates either section does not have his or her legal status as a member of the legislature affected or implicated. A bona fide violation of either section could only have a legal effect on the validity of a non-legislative office or employment.

As to Section 4, the term "public office of profit or trust" has not been definitively interpreted or defined by the courts. However, the Attorney General has articulated a test it uses to determine whether something amounts to a public office of profit or trust under this provision. E.g., Ariz. Op. Atty. Gen. No. I84-041, 1984 WL 61269 (Mar. 16, 1984). The Attorney General, relying on Arizona Supreme Court cases that discuss the definition of public officer generally, opined that to be a public officer under Section 4, "the specific position must be created by law, there must be certain definite duties imposed by law on the incumbent, and the duties must involve some portion of sovereign power." *Id.* (citing *Tomaris v. State*, 71 Ariz. 147 (1950)).

As to Section 5, the Arizona Supreme Court, in *Winsor v. Hunt*, 29 Ariz. 504, 517-18 (1926), interpreted and defined "civil office of profit or trust" for the original version of Section 5, which was "a question of first impression in Arizona." We note the Court's observation that there is a distinction between a "public officer" and an "employee." *Id.* at 518-19 ("An 'officer' is distinguished from an employee in the greater importance, dignity, and independence of his position, in requirement of oath, bond, more enduring tenure, and fact of duties being prescribed by law"; "[a]lthough an office is an 'employment,' it does not follow that every employment is an 'office'") (citations omitted). We also note the Court's quotation of a secondary authority stating that "the terms 'office' and 'place of trust' are synonymous, and have reference to a public position[.]" *Id.* at 518.

Under *Winsor*, the Court held that the "chief elements" of a "public office" for the purposes of the original Section 5 are as follows: "The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power." *Id.* at 520-21 (emphasis omitted). Legislative Council notes that this test for an office, as applied to the original version of Section 5 by the courts, is virtually identical to the test for an office applied by the Attorney General to Section 4, and we believe that the references to "public office of profit or trust" in Section 4 and to "office" in the current version of Section 5 have the same meaning and therefore apply to the same things.

The position of reserve deputy marshal for the City of Tombstone in a volunteer capacity is not an office under either Section 4 or Section 5 because it is not a specific position created by law and otherwise fails to satisfy the test for an office. *C.f.* Tombstone, Arizona: City Code, Title 5, Chapter 1 (Marshal's Department) (no provisions creating the position of volunteer reserve deputy marshal).² Accordingly, Section 4 is inapplicable to Representative Kern's situation because Section 4 only applies to public offices. The portion of Section 5 relating to an "office" is likewise inapplicable here. If Section 5 applies to Representative Kern's situation at all, it can only be if the "otherwise employed" language in Section 5 covers a member of the legislature's service as a volunteer reserve deputy marshal for the City of Tombstone.

Our office has been unable to identify any direct legal elucidation of the meaning of "otherwise employed" in Section 5, although we can state that the term is not synonymous with "office." *See Winsor*, 29 Ariz. at 519 ("Although an office is an employment, it does not follow that every employment is an office") (internal quotation marks omitted); *see also Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 8 (2007) ("Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.") (internal citations and quotation marks omitted); *but c.f.* Ariz. Op. Atty. Gen. No. 56-85 (Apr. 12, 1956) (determining that Section 5 prohibits a legislator from holding an office or being employed by a municipality as a member of the City Planning and Zoning Commission "when such office is served without pay" but failing to distinguish between office and employment for the purposes of the question) (discussed in greater depth below).

Words and phrases in statutes are to be "construed according to the common and approved use of the language." A.R.S. section 1-213. When a word is not defined, courts construe it in accord with its ordinary meaning. *Mail Boxes, Etc., U.S.A. v. Industrial Comm'n*, 181 Ariz. 119, 121 (1995) ("Words have their ordinary meaning unless the context of the statute requires otherwise.") (citation omitted). The definition of "employ" is "to provide with a job that pays wages or a salary." *Merriam-Webster's Collegiate Dictionary* 408 (11th ed. 2005). This definition excludes a volunteer or otherwise unpaid position that is not an office from the definition of "otherwise employed" in Section 5 because the definition requires the payment of wages or a salary to be satisfied.

² Available at https://www.sterlingcodifiers.com/codebook/index.php?book_id=541 (last accessed April 26, 2019) (copy on file with Legislative Council).

A 1956 opinion by the Arizona Attorney General responds to the question whether "a legislator [may] hold an office or be employed by a municipality as a member of the City Planning and Zoning Commission when such office is served without pay," and states that a legislator cannot do so. Ariz. Op. Atty. Gen. No. 56-85 (Apr. 12, 1956). Unfortunately, the opinion's analysis does not contain interpretive guidance that is applicable to the question at issue here. More specifically, the Attorney General's 1956 opinion consists of four paragraphs but does not analyze the term "otherwise employed" in Section 5, nor does the opinion contain legal reasoning on the question of a legislator's service without pay to a government body in a position that is not an office.

The Attorney General's analysis explains that *Winsor v. Hunt*, *supra*, a case that held that a sitting legislator could be employed as a clerical assistant to the Code Commissioner, had been superseded by a later amendment to Section 5. *Id.* *Winsor* dealt with the earlier version of Section 5 that applied to offices only, whereas the new Section 5 (which is still current), in the Attorney General's words, "has been changed to include the word 'employed.'" *Id.* Given Section 5's newly-included term "employed," the Attorney General infers without elaboration that "a legislator is not eligible to employment by the State or any incorporated city or town or of any county thereof," which amounts to a partial restatement of the new language in Section 5 without interpretation. Nowhere in the four paragraphs does the Attorney General discuss how service without pay is to be treated under the new Section 5, nor is it mentioned that the new Section 5 removed the "of profit" qualifier from "office," the change to Section 5 that likely was more germane to the question than was the addition of the term "employed." *C.f. McClusky*, 33 Ariz. at 532 (treating the "of profit" qualifier to "office" in the original version of Section 5 as material). There is therefore no reasoning or analysis in the 1956 opinion of the Attorney General that can be used as guidance to analyze Section 5's applicability or inapplicability to Representative Kern's service as a volunteer reserve deputy marshal for the City of Tombstone.

The Arizona Supreme Court has construed the purpose of Section 5 in the following terms: "The evil sought to be avoided is the participation by a legislator in the deliberations and enactments pertaining to a public office which might subsequently be held by him during his term as a legislator." *Myers*, 89 Ariz. at 169. In a later case, the Supreme Court also stated that when the voters amended Section 5 to its current form, they did so out of concern "that members of the Legislature might create positions for their own gain, or otherwise be subjected to pressures from the executive branch." *State ex rel. Nelson v. Yuma Cty. Bd. of Sup'rs*, 109 Ariz. 448, 449 (1973) (majority opinion). We do not believe that a member of the legislature who holds a voluntary position with a local government body that is not an office implicates this concern or runs afoul of Section 5's purpose. Volunteer marshals do not participate in any of the City of Tombstone's policy deliberations, nor do they gain pecuniarily.

Accordingly, given the ordinary meaning of "employ," which contains within it the concept of remuneration in exchange for work, and the concerns and purposes underlying Section 5 as articulated by the judiciary, we interpret being "otherwise employed" in Section 5 to mean holding a position with the state, a county or

incorporated city or town within the state, that is *not* an office and that *is* for pay. A volunteer or otherwise unpaid position that is not an office does not fall within the scope of Section 5. Representative Kern's service as a reserve deputy marshal for the City of Tombstone in a volunteer capacity therefore did not implicate Section 5 because that position is not an office, nor is it employment. However, we note that even if Section 5 had been implicated and violated, the violation would not have implicated Representative Kern's legal status as a member of the legislature, though it could have implicated his legal status as a volunteer reserve deputy marshal.

CONCLUSION

Representative Kern's former position as a volunteer reserve deputy marshal for the City of Tombstone was not an office for the purposes of Section 4 or 5, nor was it employment for the purposes of Section 5. If Representative Kern or any member of the legislature violates either Section 4 or 5, the violation would not implicate their legal status as a member of the legislature but would implicate the legal status of their non-legislative office or employment.